Pages 1 - 22

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

CORONAVIRUS REPORTER, CALID, INC.; PRIMARY PRODUCTIONS, LLC; DR. JEFFREY D. ISAACS, on behalf of themselves and all others similarly situated, Plaintiffs,	
VS.	NO. 21-cv-05567-EMC
APPLE, INC.; and FEDERAL TRADE COMMISSION, Defendants.	San Francisco, California

Thursday, November 4, 2021

TRANSCRIPT OF PROCEEDINGS

APPEARANCES: (By Zoom Webinar)

For Plaintiffs:

ASSOCIATED ATTORNEYS OF NEW ENGLAND
Post Office Box 278
Manchester, New Hampshire 03105
BY: KEITH MATHEWS, ESQ.

For Defendant Apple, Inc.:

GIBSON DUNN & CRUTCHER LLP
555 Mission Street
Suite 3000
San Francisco, California 94105-0921
BY: RACHEL S. BRASS, ESQ.
JULIAN W. KLEINBRODT, ESQ.

Also Present:

DR. JEFFREY D. ISAACS

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

Thursday - November 4, 2021 **2:50 p.m.**

P R O C E E D I N G S

THE COURTROOM DEPUTY: Calling Civil Action 21-5567, Coronavirus Reporter, et al. versus Apple, Inc., et al.

Counsel, please state your appearances for the record, beginning with counsel for plaintiffs.

THE COURT: Um, are we frozen?

DR. ISAACS: I'm sorry.

Good afternoon. I'm Jeffrey Isaacs. And I'm representing myself and my apps.

THE COURT: Okay.

You're muted, Angie.

THE COURTROOM DEPUTY: All right.

MS. BRASS: Rachel Brass for Apple, Inc.

THE COURT: Thank you, Ms. Brass.

MR. CLINE: Julian Kleinbrodt for Apple, Inc.

THE COURT: Thank you, Mr. Kleinbrodt.

And Mr. Mathews?

MR. MATHEWS: Yes. My apologies. I'm not sure what happened there. I just got disconnected.

THE COURT: All right. And you are appearing on behalf of?

THE COURTROOM DEPUTY: I believe he's frozen, Your Honor.

THE COURT: Oh. Okay.

THE COURTROOM DEPUTY: Must not be --

THE COURT: Problematic. He's appearing on behalf of Apple as well, or who --

MS. BRASS: No, Your Honor, Mr. Mathews is counsel for Ms. -- Coronavirus Reporter and Primary Productions, as the plaintiffs.

THE COURT: Okay, all right. Well, we've got a little problem if he's frozen.

THE COURTROOM DEPUTY: He may need to exit and -- okay.

Mr. Mathews?

MR. MATHEWS: Yes. I apologize. I'm not sure what happened there.

THE COURT: Your connection is weak. You froze completely. It might help if you turn off your video and just go with audio. You might just shut your video down.

MR. MATHEWS: Sure.

THE COURT: Sometimes that helps connectivity. If for some reason we can't hear you, then we will have to try something else, maybe phone in or something.

MR. MATHEWS: My apologies, Your Honor. My wifi is usually pretty good.

THE COURT: Yeah, okay. Well, there are a lot of issues here, and I'm not going to cover everything, but I do want to cover a couple major issues here. And the first one,

of course, is the question of relevant market, and market definition.

And as I understand it, as this has evolved -- and correct me if I'm wrong, plaintiffs -- that the principal markets on which your antitrust claims are predicated consists of what might be deemed two fore-markets, U.S. smartphones or U.S. iOS smartphones, as kind of an alternative single-brand fore-market. And then the downstream markets, which are iOS institutional app market, iOS notary stamp market, and iOS application for loader market (Phonetic), and iOS user base market.

When you put all that together, that speaks to a single-brand market. Which, as you know, is rarely recognized in antitrust law. And, and I have a problem understanding why that would be so here.

So, for instance, the Coronavirus app -- Reporter app, I mean, that's something that could benefit or could be used with the proper licensing, et cetera, et cetera, on Android devices, could it not?

DR. ISAACS: Yeah, that's right, Your Honor. I would like to say you're spot-on as to the different marketplaces, except that we state that, as you said, as an alternate theory, as a single market.

So the main theory we rely upon for all the apps here -- I speak for myself, but it's for Coronavirus and everybody -- is

the U.S. smartphone market. Which is a not a single product marketplace. And that's where there's a discrepancy to the market share.

Apple, we state they have 64 to 80 percent market share there. So they certainly market power and, we would say, monopoly.

So we really bring in the Kodak single-market theory for all the apps as an alternate theory. And we don't think we need that to prevail here. We just state it in the case, that that law does apply after all the fact-finding is done. So we state it as an alternate theory.

Now, some of the downstream markets are definitely single-product. And we can go into that. But for the main fore-market, it's definitely not a single-product marketplace.

THE COURT: Well, given this is really, I think, a two-sided market, I don't think we can ignore the downstream market. So don't we have to account for the fact that your antitrust theories look to the downstream side, as well as the fore side?

And to the extent that the downstream side is a singular tie to a single brand, isn't that problematic?

DR. ISAACS: No. I would again say that it's not a sin- -- it's not a two-sided marketplace here. I'm not sure which marketplace you're referring to, but I assume you're speaking about the app marketplace being two-sided, because

that seems to be the main debate we've had in the pleadings with Apple. Because Judge Gonzalez Rogers did, of course, find the app store to be a two-sided transactional platform.

We believe that is different in this case. The way we've set out the facts, it's really the app marketplace monopsony. Like a book publisher. In fact, today's news, FTC and DOJ are looking at Penguin Books and Simon and Schuster with a monopsony theory, which really -- which has really been reinvigorated in our media age, in the last few years. That's why it took us a while, frankly, to come up with this monopsony theory over the last few amendments we've done.

So we're looking at Apple is the only buyer of apps, just like Penguin Books and Simon and Schuster would be the only buyer of books from authors. Or if Sony Video is the only buyer of movies. So we're saying it's not two-sided.

And, just one last point. For free apps, it's especially not two-sided, because there's no equal transaction, like ***Epic***, that Judge Gonzalez Rogers looked at.

A free app doesn't have a price. So it's actually very hard for us -- it took quite a while to develop a monopoly or monopsony theory for a free app. And there is no symmetric opponent in size to the App Store for free apps.

So we would say -- the long -- long story short, the answer is definitely no, we believe, for that -- for your question.

THE COURT: Well, but your -- your market, your theory and your analogy to book publishers hinges on Apple really being the buyer of apps, and then ultimately, you know, buying it at one level, and then selling it at another level.

Here, that model doesn't seem to work. They're not buying -- Apple's not really buying it. It's serving as an intermediary, um --

DR. ISAACS: Well, that's why -- (inaudible) almost a hypothetical market --

(Reporter interruption)

DR. ISAACS: Myself -- I'm sorry.

I would say we do have a footnote that it's almost a hypothetical market.

And, again, this is difficult. We don't know any other case that brings -- protects free apps from censorship. So some of this is a bit hypothetical, in that if there was no App Store monopoly, and every developer could sell within the shopping mall their apps, then you wouldn't have this monopsony. And you wouldn't have it where the only buyer is Apple.

But the FAC does cite that Apple bought a weather app that they distributed as free, and they bought it for tens of millions of dollars. So there are instances where Apple purchases free apps from developers.

And we would say, here, they are effectively purchasing

it. They could bundle it with the iPhone; they could give it away for free. But that's not our only theory, because we recognize that's a novel theory, and we believe it will prevail. But we do have four other downstream theories if that were to not proceed.

But we believe that is our best theory, that they are a monopsony buyer, even though it's largely free and hypothetical.

THE COURT: All right. Let me hear from Apple.

Why -- why isn't there a potential claim, given Apple's dominance in the distribution chain here?

MS. BRASS: Yes, Your Honor.

Well, to start with, your answer on the distribution chain. And again, this is Rachel Brass for Apple. Distribution chain is not a market.

I think the problem with this case is best stated by what Mr. Isaacs just said. He's arguing a hypothetical market. But the law is clear. You need to look at referents to reasonable interchangeability of use and cross elasticity of demand. Which you cannot do in a hypothetical market.

You have to ask: What is the product? Single-brand markets, as you say, are disfavored.

And you have to ask: Is the market alleged something that bears some relationship to the claim alleged?

So take, for example, the single-phone -- sorry. The

smartphone market that's not a single-phone market -- a single-brand market. None of Mr. Isaacs' claims allege injury to competition in that market. If it is a market in theory, it has nothing to do with the claims and injuries asserted here.

To the extent Apple might be a buyer for some apps, for example, that also has nothing to do with the claims alleged here. Here, the claims are about apps on the App Store. That is a two-sided market.

And as the Supreme Court has explained in ***AMEX***, where something is a two-sided market, you need to define the market with reference to that two-sided platform.

Coronavirus Reporter, Mr. Isaacs, the plaintiffs here, they don't allege that they went and sought a sale of an app to Apple, like the weather app he identified as an analogy. They allege that they participated in the app review process, and with respect to Coronavirus Reporter and Primary Productions, were rejected. And they allege that for certain apps that were on the App Store, they were dissatisfied with search ranking.

Those are the injuries that are alleged. And those have nothing to do with any of the markets Mr. Isaacs just described.

And then, importantly, none of the factors that a court looks to to determine whether facts are alleged that help you identify the outer bounds of a market are in the complaint here. That's true if you look under the test from the Ninth

Circuit in *Hicks* on interchangeability of use and cross elasticity of demand; that's true if you look at the *Brown Shoe* factor.

You can use either of those tests to determine if a relevant products market is alleged. Not just a product market, but one that is relevant to the claims asserted, and under any standard. That's not done here.

And I think, you know, the most direct case you might look at for this is Judge Gonzalez Rogers' decision in the pistachio case, which we cite in our brief, where she looks at similarly scant allegations of fact and finds in the absence of evidentiary fact, meeting the *Hicks* standard, there is no relevant market alleged.

THE COURT: Well, if -- if the market alleged here were U.S. smartphones generally, which would include both iOS as well as Android, would that be sufficiently defined?

MS. BRASS: No, Your Honor. Because the outer boundaries of what constitutes a smartphone would not be established.

But even if that were a market, it's not a relevant market for any of the claims alleged. It's not simply enough to say something is a market, if it has no relationship to the claims that are asserted.

Finally --

THE COURT: If the claim asserted is -- is trying to

get an open market and have access to all smartphones, why isn't that a sufficient relationship? And that Apple is impairing that access?

Why isn't that at least, quote, relevant?

MS. BRASS: Well, one, Your Honor, several of the plaintiffs here were on the App Store, suggesting that there would not be an injury for impairing access to that market.

And two, I don't think that is the claim alleged here. The claim alleged here is -- you know, unless it is that Apple -- I'll -- to start with, I don't think that is the claim alleged here. That Apple controls the market for all smartphones, such that applying standards to the App Store is an abuse of monopoly power in that market.

THE COURT: Well, it's Apple controls access to a large portion of that market. It may not be 100 percent, may not be a monopoly, but it's got market power relative to even that broader market of all U.S. smartphones.

And if it controls access of these app developers to that, why -- explain to me again, why isn't that a, quote, relevant market?

MS. BRASS: Well, Your Honor, I don't think there are facts in the complaint from which one can determine that there is market power.

Mr. Isaacs -- sorry -- the complaint alleges that the market is below 65 percent to Apple's share. And as a matter

of law, that's insufficient standing, alone, to establish market power.

Also, developers aren't accessing devices. They're trying to get into the store. And so again, if it's a complaint about access to the store, then smartphones are not the relevant market.

THE COURT: Well, so let me ask you, then, either Mr. Mathews or Mr. Isaacs, is the claim access to the store? Or access to the devices?

DR. ISAACS: I believe the FAC is clear there. We talked about the network effect of some 180 million smartphone or iPhone users, so -- and then the user-based access downmarket, certainly, that Apple is selling for $99 for a year to developers, access to that network affect.

So whether you look at under ***Aspen*** as an essential facility, or an obligation or duty to deal under the MCI, essential facility, just, we --

THE COURT: Wait. I'm not talking about the theory yet. You're jumping ahead of me.

DR. ISAACS: Sorry.

THE COURT: I asked a simple question. What is the access denial -- what is the access issue here? Is it to the devices, themselves? Smartphones? Or is it to the store?

DR. ISAACS: Yeah, I would say the devices, themselves, Apple blocks access to that by the user-based

access right, downmarket. They select who gets access to that network effect of smartphones. And there's different ways we plead that, theoretically.

But the fact is it's that network of 180 million devices that we -- we think it's important. People pay for those devices, and the government pays for how they're connected, through the origin of the internet. So we're talking about the physical.

I mean, to answer your question, we're talking about 180 million physical devices, and how they're connected. And Apple controls access to that, that they sell for $99 a year to developers.

THE COURT: All right.

So Ms. Brass, what about that? If that's the theory, that Apple stands in the way of using its market power to control access to the ultimate devices, what's your comment with that?

MS. BRASS: Um, Judge Chen, it's the same argument. The facts, as alleged, for Apple's market share are insufficient to establish market power as a matter of law.

And there are no other facts in the complaint that allege that Apple has market share, other than assertions -- I mean, has market power, other than assertions about market share.

And to the extent that Mr. Isaacs is arguing about network effect, network effects are not a product.

THE COURT: All right. But if -- if it's just about

access to devices and if -- if there were sufficient allegations to show enough market share to imply market power, would that be enough to state a relevant market?

MS. BRASS: I'm sorry, Your Honor, I think I lost that question. I'm sorry. Can you --

THE COURT: I guess it's the only -- you identified as one of the problems with their theory, there are not enough facts to establish the requisite market share.

Right?

MS. BRASS: There's not facts to establish market power. The market share --

THE COURT: Market power.

MS. BRASS: -- is too low to establish market power.

THE COURT: All right.

MS. BRASS: And he's not in the smartphone market, Your Honor. And for most of the theories he's alleged -- this goes back to my core argument -- it's still not a relevant market.

For example, for the essential facilities argument that Mr. Isaacs was arguing, you have to be a competitor in the relevant market.

So, none of the plaintiffs here are smartphone manufacturers. And so, again, it may be a market, but it's not the relevant market for any of the claims asserted.

THE COURT: All right. Well, that gets to the other

issue about -- that you have raised about lack of competitive injury here.

Right?

MS. BRASS: (Nods head)

THE COURT: That the injury here is not to Apple's competitors; it's not like Apple is trying to sell a competing app, and icing people out. It is unhappiness with getting access to the store.

How is that an antitrust injury?

How is there injury to the general competition, and reduction, for instance, of general output?

There's individual grievances. But, how is that anti-competitive injury?

DR. ISAACS: Um, can I answer that question, Your Honor?

THE COURT: Yeah, yeah.

DR. ISAACS: Well, I would say we compete with Apple in two respects here. One, we are competing app developers, Apple has a lot of apps they publish, they make money off of. So we are competitors there.

And then we're also competitors --

THE COURT: Have you identified any one of the plaintiff products that are in competition with an Apple-owned app?

DR. ISAACS: Sure. Like Web Collar (Phonetic) that I

designed, and Facetime 15. They have a Covid app that they would say is part of the operating system; we would say it's an app, and that's for fact-finding. And then, of course, Dr. Roberts had a COVID-19 app. So those are two, right there.

I think we got into more with Apple Arcade in the complaint. I don't represent -- again, I believe they're in there.

So in addition to being competitors of apps, we are also competitors or would-be competitors as app distributors. Because as the complaint says, any distributor could put up a shop on the internet, and in five minutes -- "trivally" (Phonetic) is the word used in the FAC, so we -- or a shopping mall in a brick-and-mortar store.

So we'd like to be distributor of apps, we'd like -- we are competitors of Apple. But we're being disallowed from competing with Apple there. So, again, Apple's policies and market power or market influence prevents us from being a competitor.

Where we actually are competitors is app distributors. The only way to distribute an iPhone app is the App Store. And it should be that -- you know, openly. Every other computing platform in history -- and that's emphasized throughout the pleadings -- every other major computer platform in history -- Android, you know, the Mac, Mac operating system, Windows --

they allow competing distribution points.

So we're a competitor as a distributor, and a competitor as an app -- as a competing app, you know, like the COVID-19 or Facetime app.

THE COURT: All right. What about that argument, Ms. Brass? That there is antitrust competition in terms of the distribution. Maybe a small self-distribution, but distribution, nonetheless.

MS. BRASS: First, Your Honor, there are no allegations in the complaint that any of the plaintiffs here have ever attempted to open or build or program a store. The fact that one could theoretically do it as an app is not antitrust injury.

Second, nothing he's talking about is injury to competition. It's injury, perhaps, to specific apps. It's not sure how -- clear how the apps that were allowed on the store were denied access to the store.

And those that were on the store, where he com- -- the plaintiff's complaining that there is unfair competition on the store from other apps, that, again, doesn't have anything to do with the market that has been argued. The smartphone market. You have to look --

THE COURT: I thought there were allegations about denial of access to the App Store because of the, you know, health implications of what the criteria are, or blockchain

apps not being permitted.

MS. BRASS: That's correct, Your Honor. But those complaints -- we have two sets of complaints here. One is complaints about people who were denied access under Apple policy. And we have other complaints about apps that allegedly compete against certain Apple apps. And we can't conflate those in thinking about which market the injuries arise in.

We also -- he can't show there's insufficient competition for these apps in the allegations. That's what he needs to allege.

For example, for the COVID-19 app, the plaintiff alleges that there are thousands of apps for COVID-19 that have been allowed on to the App Store. So that is not an injury to competition. That's an injury to Coronavirus Reporter.

There is an allegation that there is an Apple app that competes with one of plaintiff's apps. But that is not an injury to competition in an alleged market. That's competition that the plaintiff doesn't like facing. None of those are cognizable antitrust injuries.

THE COURT: All right.

Response to that, Mr. Isaacs? Where's the -- the aggregate market impairment, as opposed to injury to a specific app?

DR. ISAACS: Sure. And that goes back to the

marketplace here for apps. What we call the national app market or national institutional app market.

And that really -- institutional could be -- you could say a creators' market. It's buying from authors. Just like Penguin Books or Sony Film, there's a market for films in this country; we all know it. There's a market for books in this country; we all know it. They're interchangeable; there's elasticity of demand. And there are -- similarly, apps are no different. They're created by authors, developers, programmers, film producers. It's all just creative works.

But this country has a Sherman law. You know, to not have one monopoly, one bottleneck. And again, it's not hypothetical. We say it's kind of hypothetical. But the marketplace, it's real. It's bottlenecked. Creators' works, the apps, just like books or films, are being bottlenecked.

And that's about as big of a competitive injury --

THE COURT: What's the evidence --

DR. ISAACS: (Inaudible)

THE COURT: Excuse me. What's the evidence of an aggregative bottleneck?

DR. ISAACS: The -- Apple introduced it, themselves. China's free markets are four times the size of ours. And an entire -- every Corona smartphone app was not allowed -- or startup was not allowed. That's not just Coronavirus Reporter. That's every startup that wanted to contribute to

the pandemic was not allowed, because Apple set criteria.

So just in that submarket of apps, there's a massive bottleneck.

THE COURT: What's the evidence that you've alleged that shows how many apps were denied versus how many apps that actually have made it, to show some aggregative effect?

DR. ISAACS: We would need that in discovery. We think that China -- the end result is the Chinese data, that it's four times the size of the App Store. So we have the end result there. We don't have the actual procedural or statistics you are asking for. We just don't have that at this time.

But with 40,000 app rejections a week by Apple -- I think that's the last count -- I would say the answer is probably, probably strong evidence, Your Honor, is what I would surmise. But I don't have that data.

THE COURT: All right.

Ms. Brass, what about that? There's 40,000 rejections a week. Doesn't that -- does that show some potential aggregative impact?

MS. BRASS: Two things, Your Honor.

First, as Mr. Isaacs has argued just now extensively, that there is an app market. And if that's correct, as we posit it is, then that would be a single-brand market. It is, for the purpose of these claims. And a single-brand market would be

disfavored.

It's not clear what the outer boundaries of that are. But if there is an app market, then the phones are not the basis of competition; that's not the relevant market.

Second, there's no evidence that U.S. consumers don't have sufficient choice, even if 40,000 apps are rejected. And, of course, there are competitor smartphones, and there are web apps, and there are the internet -- is the internet, all of which are, for example, with respect to COVID-19, alternative places consumers could have gotten information about their apps.

The mere fact that apps are allegedly rejected at an alleged number doesn't tell you whether the Apple single-brand App Store is a relevant market, or a market, at all. Nor does it, again, connect back to the claims that are asserted here. Nor could it ever be an injury for the three apps that were allowed to compete on the App Store.

THE COURT: All right. Well, those are the issues. I understand there's questions about, under 12(b)(6), what the requisite elements of antitrust claim are made.

But it seems to me there are these threshold questions about definition, sufficient definition, identification of relevant markets, and the existence or not of antitrust injury.

So I will take the matter under submission. Thank you, counsel.

DR. ISAACS: Thank you.

MR. MATHEWS: Thank Your Honor.

MS. BRASS: Thank Your Honor.

THE COURT: Thank you.

(Proceedings concluded)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Monday, November 15, 2021